A **LOW AH LECK**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
KN SEGARA JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: B-05-237-2010]
C 24 FEBRUARY 2012

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Conviction and sentence - Appeal against - Search list - Both accused and one other person signed search list confirming seizure of*
D *drugs from them - Whether reasonable doubt arose as to real owner of drugs - Appeal concerning mandatory death sentence - Whether prosecution's standard of proof beyond reasonable doubt must be established - Whether unsafe to convict appellant*

E ***CRIMINAL PROCEDURE:*** *Search - Search list - Two men arrested for drug trafficking - Appellant and one other person signed search list confirming seizure of drugs - Whether reasonable doubt arose as to real owner of drugs - Two inferences arose as to whether drugs in appellant's possession or other person's possession - Whether inference more favourable*
F *to appellant should be adopted*

The accused was convicted of the offence of trafficking in 353.2gm of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and mandatorily sentenced to death under s. 39B(2) of the same Act. The accused appealed against the said
G decision. It was the prosecution's case that a police party led by police officer SP1 were waiting in ambush when the accused was seen walking and holding a white plastic bag (P12) to meet with a man in front of a restaurant. SP1 and his men arrested them and SP1 during trial testified that at the time he arrested the
H accused, the latter was holding P12 while the other man, one Kwong Peng Seng (now deceased) had been arrested by SP4. SP1 tendered a search list in exh. P5 where it was stated expressly that two persons *viz.* the accused and Kwong Peng Seng ('KPS') had been searched. From these two persons, a
I white plastic bag containing the impugned drugs had been seized.

Both the accused and KPS had signed the search list and confirmed the search and seizure of the said articles from both of them. The accused herein raised the issue that since the accused and KPS were both instructed to sign exh. P5, it raised a reasonable doubt as to the real owner of exh. P12. The issue for determination was whether the conviction of the accused was unsafe as exh. P5 were jointly signed by the appellant and KPS.

Held (allowing the appeal; setting aside the decision of the High Court; acquitting and discharging the appellant)
Per Low Hop Bing JCA (majority):

(1) The prosecution evidence admitted two inferences *viz.* (i) the impugned incriminating drug was in the accused's possession and (ii) the said drug was in the deceased's possession. In such circumstances, it is trite law that the inference that is more favourable to the accused should be adopted *(PP v. Mohd Radzi Abu Bakar; Magendran Mohan v. PP)*. Therefore, it was unsafe for the trial court to come to a finding that the accused was in possession of the impugned incriminating drug. This appeal concerned mandatory death sentence and the prosecution's standard of proof beyond reasonable doubt must be strictly established. (paras 7-9)

Per KN Segara JCA (majority):

(1) The contemporaneous document P5, with the two suspects' signatures (the accused and KPS) was prepared by SP1 himself with no evidence therein, direct or indirect to incriminate the accused with possession of the plastic bag. The absence of any credible evidence tendered by the prosecution exculpating or exculpatory of KPS, bearing in mind the contemporaneous document P5, could give rise to the inference that the plastic bag would very well have been in the possession of KPS. The conviction of the appellant for an offence carrying the mandatory death sentence was unsafe. (para 14)

Per Azahar Mohamed (dissenting):

(1) It was the prosecution's case that the appellant was holding exh. P12 when he was arrested by the police. The Judicial Commissioner had accepted the evidence of the prosecution witnesses (PW1 and PW2) as it was her findings that both

these witnesses were reliable and were witnesses of truth. Her findings of fact did not contain any error warranting appellate intervention. (para 23)

(2) The Judicial Commissioner was entitled and correct in making the finding that the appellant knew all along that exh. P12 found in his possession contained the offending drugs. Further, since the weight of the methamphetamine in question exceeded the quantity specified in s. 37(da)(xvi) of the Act, the Judicial Commissioner was entitled to invoke the presumption of trafficking and to hold that a *prima facie* case had been established against the appellant. (para 24)

(3) The appellant denied that he was holding exh. P12 when he was arrested by the police. His defence was that exh. P12 was found by the police at the side of the drain near the tyre of a car. He had presented a differing version and diametrically opposed to the prosecution's case. After careful consideration and analysis of the two versions, the Judicial Commissioner found the defence story to lack credibility and that the appellant had not created any reasonable doubt on the prosecution's case. The Judicial Commissioner was justified in doing so. (paras 25-26)

(4) Exhibit P5 must be scrutinised properly and correctly. It was clear and unambiguous. It was expressly stated in the exhibit that the name of the person who had been searched was the appellant and KPS and that the exhibit had been signed by the appellant as well as KPS. Most significantly, nowhere did exh. P5 state from where exh. P12 containing the drugs was found. Equally important was the need to realise that exh. P5 did not state from whom exh. P12 was recovered. Also, it was firmly refuted by PW1 that exh. P12 could have been in the possession of KPS. Thus, the issue regarding exh. P5 was incapable of raising a reasonable doubt on the prosecution's case. Therefore, there was no merit in this appeal. The evidence presented by the prosecution against the appellant was compelling and the conviction of the appellant was safe. (paras 27-28, 30, 33-34)

Bahasa Malaysia *Translation of Headnotes*

Tertuduh telah disabitkan atas kesalahan mengedar 353.2 gram methamphetamine di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan dihukum mati mandatori di bawah s. 39B(2) Akta yang sama. Perayu membuat rayuan terhadap keputusan tersebut. Ia adalah kes pendakwaan bahawa pihak polis yang diketuai oleh seorang pegawai polis sedang menunggu untuk melakukan serangan hendap apabila perayu dilihat berjalan dengan memegang beg plastik berwarna putih (P12) untuk berjumpa seorang lelaki di depan sebuah restoran. SP1 dan pegawai-pegawainya telah menangkap mereka berdua dan SP1 telah memberi keterangan semasa perbicaraan bahawa pada masa SP1 menangkap perayu, perayu sedang memegang P12 manakala lelaki lagi satu itu, seorang yang bernama Kwong Peng Seng (sudah meninggal dunia) telah ditangkap oleh SP4. SP1 menyerahkan senarai carian eks. P5 di mana ia telah dinyatakan dengan jelas bahawa tertuduh dan Kwong Peng Seng ('KPS') telah diperiksa. Daripada mereka berdua, satu beg plastik putih yang mengandungi dadah telah dirampas. Kedua-dua tertuduh dan KPS telah menandatangani senarai carian dan mengesahkan pemeriksaan dan rampasan bahan-bahan tersebut daripada mereka berdua. Perayu di sini membangkitkan isu oleh kerana perayu dan KPS kedua-duanya telah diarahkan menandatangani exh. P5, ia membangkitkan keraguan munasabah berhubungan pemilik sebenar exh. P12. Isu yang perlu ditentukan adalah sama ada sabitan perayu adalah selamat atas sebab exh. P5 ditandatangani bersama-sama oleh perayu dan KPS.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi; membebaskan dan melepaskan tertuduh): Oleh Low Hop Bing HMR (majoriti):

(1) Keterangan pihak pendakwaan memperakui dua inferens iaitu (i) dadah tersebut berada dalam milikan tertuduh dan (ii) dadah tersebut adalah dalam milikan simati. Dalam keadaan sedemikian, ia adalah undang-undang mantap bahawa inferens yang lebih memihak kepada tertuduh harus digunapakai (*PP v. Mohd Radzi Abu Bakar; Magendran Mohan v. PP*). Oleh itu, adalah tidak selamat untuk mahkamah perbicaraan memutuskan bahawa tertuduh memiliki dadah tersebut. Rayuan ini berkenaan hukuman mati mandatori dan standard pembuktian melampaui keraguan munasabah pihak pendakwaan mesti dengan tegas dibuktikan.

A **Oleh KN Segara HMR (majoriti):**

(1) Dokumen semasa P5, yang mempunyai tandatangan kedua-dua suspek (tertuduh dan KPS) disediakan oleh SP1 sendiri tanpa apa-apa keterangan, secara langsung dan tidak langsung, untuk
B menunjukkan bahawa tertuduh mempunyai milikan beg plastik tersebut. Ketiadaan apa-apa keterangan kredibel dikemukakan oleh pihak pendakwaan membebaskan atau melepaskan KPS, mengambil kira dokumen semasa P5, boleh membawa kepada inferens bahawa beg plastik berkemungkinan berada dalam
C milikan KPS. Sabitan perayu bagi kesalahan yang membawa hukuman mati mandatori adalah tidak selamat.

Oleh Azahar Mohamed (menentang):

(1) Ia adalah kes pendakwaan bahawa perayu sedang memegang
D exh. P12 apabila perayu ditangkap oleh polis. Pesuruhjaya Kehakiman telah menerima keterangan saksi-saksi pendakwaan (PW1 dan PW2) kerana ia adalah penemuannya bahawa kedua-dua saksi pendakwaan boleh dipercayai dan adalah saksi-saksi yang bercakap benar. Penemuan faktanya tidak
E mengandungi sebarang kesilapan yang mewajarkan campurtangan rayuan.

(2) Pesuruhjaya Kehakiman berhak dan betul apabila membuat penemuan bahawa perayu mengetahui selama ini yang eks. P12
F yang dijumpai dalam milikannya mengandungi dadah-dadah tersebut. Seterusnya, oleh kerana berat methamphetamine yang dipersoalkan melebihi kuantiti yang dinyatakan di dalam s. 37(da)(xvi) Akta, Pesuruhjaya Kehakiman berhak untuk menggunakan anggapan mengedar dan untuk memutuskan
G bahawa satu kes *prima facie* telah dibuktikan terhadap perayu.

(3) Perayu menafikan bahawa beliau sedang memegang eks. P12 apabila beliau ditangkap polis. Pembelaannya adalah eks. P12 dijumpai polis di tepi longkang berdekatan tayar sebuah kereta.
H Perayu telah memberi versi yang berbeza dan bertentangan dengan kes pendakwaan. Selepas mempertimbangkan dan menganalisa dengan teliti kedua-dua versi tersebut, Pesuruhjaya Kehakiman mendapati pembelaan tidak mempunyai kredibiliti dan perayu tidak menimbulkan keraguan yang munasabah ke
I atas kes pendakwaan. Pesuruhjaya Kehakiman mempunyai alasan yang kukuh untuk berbuat demikian.

(4) Eksibit P5 harus diteliti secara betul. Ia adalah jelas dan nyata. Ia telah dinyatakan dengan jelas di dalam eksibit bahawa nama orang yang telah diperiksa adalah perayu dan KPS dan eksibit telah ditandatangani oleh perayu dan juga KPS. Yang paling ketara, tidak terdapat di dalam eks. P5 yang menyatakan dari mana eks. P12 yang mengandungi dadah-dadah tersebut dijumpai. Sama penting adalah keperluan untuk menyedari bahawa eks. P5 tidak menyatakan dari siapa eks. P12 ditemui. Juga, ia disangkal dengan tegas sekali oleh PW1 bahawa eks. P12 berkemungkinan berada di dalam milikan KPS. Oleh itu, isu berhubungan eks. P5 tidak berupaya menimbulkan keraguan munasabah ke atas kes pendakwaan. Dengan itu, tiada merit di dalam rayuan ini. Keterangan yang dibentangkan oleh pihak pendakwaan terhadap perayu adalah kukuh dan sabitan perayu adalah selamat.

Case(s) referred to:
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohamed Yatin Abu Bakar v. PP [1949] 1 LNS 50 ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 394 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a), (2)

For the appellant - Lt Kol Roseli Abdul Gani (B); M/s AG Roseli & Assoc
For the respondent - How May Ling DPP

[Appeal from High Court, Shah Alam; No: 45-90-2008]

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing JCA:

[1] The accused has been convicted of the offence of trafficking in 353.2 gm of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and mandatorily sentenced to death under s. 39B(2) of the same Act.

[2] An essential ingredient to sustain the offence of trafficking is possession of the drug in question.

[3] Evidence was adduced for the prosecution through SP1 and SP4. I note that SP1 has tendered a search list in exh. P5 at p. 340 of the appeal record. It states expressly that two persons *viz* the accused and one Kwong Peng Seng have been searched ("yang kena periksa"). From these two persons, the Tesco Extra Plastic Bag containing the impugned drug and several other items had been seized ("dirampas") as listed therein. Both the accused and the said Kwong Peng Seng had signed the search list and confirmed the search and seizure of the said articles from both of them.

[4] In SP1's evidence, he agreed that the "catatan" (remarks) column had been left blank and that the "catatan" column was for him (ie, SP1) to state from where and how the abovesaid articles have been seized. SP1 admitted that from where and how the abovesaid articles have been seized is of the utmost importance in this case ("amat penting dalam kes ini").

[5] When P5 was referred to SP1, SP1 confirmed that the aforesaid two persons had been searched ("kena periksa"); and that Kwong Peng Seng had been arrested because he was also suspected to be involved. The said Kwong Peng Seng was not charged, but has since passed away. SP1 further confirmed that the Tesco Extra Plastic Bag did not contain the personal things of anybody ("tidak ada barang-barang peribadi sesiapa"). (See pp. 59 and 60 AR).

[6] Given the aforesaid documentary and oral testimony of SP1, the question for our determination is whether the accused can be said to be in possession of the impugned incriminating drug which had been seized from both the accused and the deceased after a search on both of them. I answer this question in the negative.

[7] The prosecution evidence admits of two more inferences *viz.*

(1) The impugned incriminating drug was in the accused's possession; and

(2) The said drug was in the deceased's possession.

[8] In such circumstances, it is trite law that the inference that is more favourable to the accused should be adopted. *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; and *Magendran Mohan v. PP* [2011] 1 CLJ 805 FC, applying *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948-1949] Supp MLJ 105, at p. 108.

[9] Therefore, I am of the view that it is unsafe for the trial court to come to a finding that the accused was in possession of the impugned incriminating drug. I am mindful of the fact that this appeal concerns mandatory death sentence and the prosecution's standard of proof beyond reasonable doubt must be strictly established. I am not prepared to say that the prosecution has discharged this standard of proof.

[10] I am therefore unable to agree with the decision of the learned Judicial Commissioner in finding the accused guilty and convicting the accused.

[11] I therefore allow this appeal, set aside the entire decision of the High Court and substitute it with an order that the accused be acquitted and discharged.

KN Segara JCA:

[12] I am in complete agreement with the decision and grounds in the oral judgment of my brother Justice Low Hop Bing. I only wish to add briefly as follows in support of his decision.

[13] In view of the fact that exh. P5 (search list) is a contemporaneous document prepared by SP1 on 23 May 2008 after the joint search of and seizure from the appellant (accused) and one other suspect Kwong Peng Seng at the scene of the alleged trafficking, there is a serious doubt as to whether possession of the plastic bag was in fact at all material times in the hands of the accused as testified by SP1 and SP4 on 2 March 2010 and 4 March 2010, almost two years after the incident.

[14] Further, as the other suspect, one Kwong Peng Seng, had also signed the document exh. P5 jointly together with the accused as evidence and acknowledgement of the seizure of the several items listed therein (including the plastic bag), and the said Kwong Peng Seng was:

(i) neither charged with any offence nor did he

(ii) testify on behalf of the prosecution that the plastic bag was seized from the accused,

A it is unsafe to make a finding that the plastic bag was in fact seized from the accused or was in fact in the possession of the accused at any material time notwithstanding the oral testimony of SP1 and SP4 that the accused was seen carrying the plastic bag in his hand, having regard in particular to the following:

B

(i) the defence that the plastic bag was found (by the police) beside the drain near the tyre of the car at the scene of the alleged trafficking and,

C (ii) the contemporaneous document P5, with the two suspects' signatures, was prepared by SP1 himself, with no evidence therein, direct or indirect, to incriminate the accused with possession of the plastic bag, and

D (iii) the absence of any credible evidence tendered by the prosecution exculpating or exculpatory of Kwong Peng Seng, bearing in mind the contemporaneous document P5 could give rise to the inference that the plastic bag could very well have been in the possession of Kwong Peng Seng.

E **[15]** The conviction of the appellant for an offence carrying the mandatory death sentence is unsafe.

[16] I agree that this appeal should be allowed. Conviction and sentence of the trial judge set aside. Appellant acquitted and discharged.

F

Azahar Mohamed JCA:

[17] The appellant was charged in the High Court at Shah Alam for trafficking in 353.2 grams of Methamphetamine contrary to G 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

[18] He was convicted on the charge and was sentenced to death by hanging as mandated by the law. He appealed to this court against the decision.

H **[19]** The facts of the case are well set out in the judgment of the learned Judicial Commissioner (see: appeal record vol. 4, pp. 287-290). Here, I will only repeat in the following paragraphs the pertinent facts as narrated by her in so far as they are relevant to the issues which arise for decision in this appeal:

I

> Pada jam lebih kurang 3.00 petang, ASP Norasib bin Hj Mamat (SP1) telah menerima maklumat daripada suatu sumber mengenai kegiatan pengedaran dadah jenis Syabu di kawasan Ampang.

Bertindak atas maklumat tersebut SP1 telah mengarahkan pegawainya yang terdiri daripada C/Inspektor Mohd Husni bin Manaf (SP4), D/Sarjan Mohd Khalid, D/Mohd Yusoff, D/Sarjan Rohaya, D/Koperal Aminudin, D/Korporal Mohd Sidek, D/Koperal Ramachandran, D/Koperal Shamsuri dan D/Koperal Roslan untuk hadir taklimat pada jam lebih kurang 4.00 petang di kawasan Masjid Pandan Indah. Taklimat berjalan lebih kurang 20 minit.

Dalam taklimat tersebut SP1 membahagikan pegawai dan anggotanya pada empat kumpulan. Sarjan Rohaya ditempatkan di dalam Restoran A&W, tiga kumpulan lain berada di hadapan dan juga di bahagian kiri dan kanan Restoran A&W.

Pada jam lebih kurang jam 4.45 petang, SP1 bersama anggotanya telah sampai ke Restoran A&W. SP1 yang memandu sebuah kenderaan Myvi miliknya bersama-sama dengan SP4 mengambil posisi di bahagian hadapan Restoran A & W iaitu di tepi jalan dengan jarak lebih kurang 15 meter daripada Restoran A&W (lihat tandaan (SP1) dalam P4). Sementara anggota lain berada dalam dua buah kereta yang lain di sebelah kiri dan kanan Restoran A&W.

Selepas SP1 dan anggota membuat pemerhatian di Restoran A&W pada jam lebih kurang 5.05 petang, SP1 nampak satu orang lelaki Cina sedang berdiri di hadapan pintu Restoran A&W iaitu di kaki lima Restoran A&W. Dalam tiga atau empat minit kemudian SP1 nampak satu orang lelaki Cina (OKT) berjalan kaki melintasi kereta SP1 dengan menjinjit satu beg plastik berwarna putih (P12) menuju ke arah lelaki yang berada di hadapan Restoran A&W.

Apabila OKT sampai ke tempat lelaki Cina yang seorang lagi berada, SP1 nampak kedua-dua mereka sedang berbual-bual. Pada ketika ini SP1 nampak OKT masih lagi memegang beg plastik putih (P12) yang dipegangnya semasa melintasi kereta SP1 tadi.

SP1 memberi arahan kepada anggotanya untuk bertindak bagi menangkap kedua-dua lelaki ini. SP1 dan SP4 mula-mula tiba di tempat di mana kedua-dua lelaki itu berada dengan diikuti oleh anggota lain. Pada masa SP1 dan SP4 tiba di hadapan Restoran A&W (tempat kejadian), SP1 dan SP4 nampak kedua-kedua lelaki itu terkejut dan lelaki Cina yang mula-mula SP1 nampak di tempat kejadian bergerak untuk beredar daripada tempat kejadian. Setelah itu SP1 bersama Sarjan Sidek dan L/Koperal Shamsuri telah memperkenalkan diri sebagai Polis kepada OKT dan terus menangkap OKT.

A SP1 juga menerangkan kesalahan yang didakwa dilakukan oleh OKT kepada OKT. Ketika SP1 menangkap OKT beg plastik putih (P12) yang dilihat SP1 dipegang oleh OKT pada masa melintasi keretanya sebelum ini masih lagi berada di tangan kanan OKT. Apabila SP1 memegang tangan OKT, OKT cuba meronta-
B ronta untuk melarikan diri.

Sementara itu SP4 pula telah menangkap seorang lelaki yang kemudiannya dikenali sebagai Kwong Peng Seng (KPS).

Selepas menangkap OKT dan KPS, iaitu pada jam lebih kurang
C 5.00 petang, SP1 telah membuat pemeriksaan ke atas OKT dan KPS di tempat kejadian dengan disaksikan oleh anggotanya. Hasil pemeriksaan SP1 mendapati beg plastik yang dirampas dari pegangan OKT berwarna putih bertulisan TESCO Extra (P12) dan di dalam beg plastik yang terbuka itu terdapat satu paket besar lutsinar yang didalamnya mengandungi serbuk dan ketulan
D Kristal disyaki dadah jenis Syabu (P13, 14 & 15).

Pemeriksaan lanjut juga dibuat oleh SP1 iaitu di sebuah kereta milik OKT yang diletakkan di kawasan flat yang berdekatan tetapi tiada apa-apa barang salah yang diperoleh daripada kereta OKT.

E Borang Pemeriksaan (P5) juga telah dikeluarkan di tempat kejadian. Selepas P5 ditandatangani oleh OKT dan KPS, SP1 telah membawa balik OKT dan KPS ke IPD Ampang bersama-sama barang kes.

[20] The substance and the crystal powder found in the plastic
F bag (exh. P12) were sent to the Chemistry Department for analysis. Puan Maimonah bt. Sulaiman, the chemist (PW7) confirmed them to be drugs categorised as Methamphetamine with a net weight of 353.2 grams listed under the 1st schedule of the Act.
G

[21] As regards Kwong Peng Seng, the learned Judicial Commissioner in her judgment said as follows:

Pihak pendakwaan telah mengemukakan percakapan KPS yang dibuat di bawah seksyen 112 KTJ (P18), menurut seksyen 32(1)
H Akta Keterangan 1950 kerana KPS telah meninggal dunia. Fakta menunjukkan OKT telah ditangkap bersama-sama dengan KPS pada hari yang sama. Walaupun percakapan ini boleh diterima masuk menurut seksyen 32(1) Akta Keterangan 1950, saya memilih untuk tidak memberi pertimbangan kepada pernyataan ini.
I Ini adalah kerana percakapan ini merupakan percakapan KPS yang dibuat selepas ditangkap dan kemungkinan KPS sebagai seorang

yang berkepentingan dalam kes ini boleh memberi apa-apa pernyataan kepada SP5 untuk membebaskan dirinya termasuklah membabitkan orang lain. Seperkara lagi keterangan ini tidak diuji melalui soal balas oleh pembelaan. Demi keadilan kepada pembelaan saya tidak menimbangkan keterangan ini.

[22] In the petition of appeal, the appellant attacked the judgment of the learned Judicial Commissioner on a number of grounds. What turned out to be of critical importance in the course of the arguments before this court is the ground that the conviction of the appellant is unsafe as the search list (exh. P5) were jointly signed by the appellant and Kwong Peng Seng. Learned counsel for the appellant has raised an issue that since the appellant and Kwong Peng Seng were both instructed to sign exh. P5, it has raised a reasonable doubt as to the real owner of exh. P12. It was argued that this could give rise to the inference that exh. P12 could also have been in the possession of the said Kwong Peng Seng. He then referred to the case of *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948-1949] Supp MLJ 105 to support the proposition that when there are two inferences, the inference most favorable to the appellant should be drawn.

[23] I do not agree with this submission. In my judgment, the complaint of the appellant in actual fact turns upon a question of fact based upon the credibility of PW1 and PW4. Both these witnesses had testified that at the material time, the appellant was holding exh. P12. And furthermore, it was the prosecution's case that the appellant was still holding it when he was arrested by the police. The learned Judicial Commissioner accepted the evidence of PW1 and PW4. It is her findings that both the witnesses are reliable and are witnesses of truth. In my judgment, her findings of fact do not contain any error warranting appellate intervention (see: *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101). As we shall see later, this specific finding of facts is significance on the issue pertaining to exh. P5 raised by learned counsel for the appellant.

[24] Since the prosecution had proved the fact that the appellant was in physical control of exh. P12, on the facts of the present case, the learned Judicial Commissioner was entitled and correct in making the finding that the appellant knew all along that exh. P12 found in his possession contained the offending drugs (see

A *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER at p. 394 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337). What is more, since the weight of the Methamphetamine in question exceeded the quantity specified in s. 37(da)(xvi) of the Act, the learned Judicial Commissioner was entitled to invoke the
B presumption of trafficking and to hold that a *prima facie* case had been established against the appellant.

[25] The appellant gave evidence on oath. He had presented a differing version and diametrically opposed to the prosecution's
C case of how exh. P12 was recovered. He denied that he was holding it when he was arrested by the police. Essentially, his defence was that exh. P12 was found by the police at the side of the drain near the tyre of a car.

D **[26]** Given these two conflicting versions, in deciding the issue of the guilt or innocence of the appellant, the learned Judicial Commissioner must consider whether the prosecution's witnesses were telling the truth and whether the appellant's version had cast a reasonable doubt on the truth of the prosecution's case. (see:
E *Mohamed Yatin bin Abu Bakar v. PP* [1949] 1 LNS 50). After careful consideration and analysis of the two versions, the learned Judicial Commissioner found that the defence story to lack credibility and that the appellant had not created any reasonable doubt on the prosecution's case. In my view, on the facts of this
F case, she was justified in so doing. Having read the judgment with care, I am not convinced that there was no judicial appreciation of the evidence of PW1 and PW4 on the part of the learned Judicial Commissioner. I do not find any infirmity in appreciation of the said evidence. Moreover, it is not the function of this court
G to substitute its findings for that of the learned Judicial Commissioner.

[27] I must now direct my attention to the only substantial ground upon which the conviction of the appellant had been attacked by learned counsel which I have alluded to earlier. I have
H given anxious consideration to the argument raised concerning exh. P5. With the greatest of respect, on consideration of material evidence on the appeal record, I am unable to see how its contents can admit two or more inferences or can even raise a reasonable doubt on the prosecution's case. It must be
I emphasised here that according to PW1 and PW4, the appellant

was carrying exh. P12 which contained the offending drugs and met up with Kwong Peng Seng. The appellant was still seen holding exh. P12 while he and Kwong Peng Seng were having a conversation. Even more to the point is the incontrovertible evidence which unmistakably established that during the arrest exh. P12 was seized from the appellant's right hand by PW1. In this lies the flaw of the submission of learned counsel for the appellant.

[28] Exhibit P5 must be scrutinised properly and correctly. It is clear and unambiguous. It is expressly stated in the exhibit that the name of the person who has been searched is the appellant and Kwong Peng Seng. It is true that the exhibit were signed by the appellant as well as Kwong Peng Seng. This is in line with the evidence given by PW1 and PW4 that a search by the police was conducted on both them. But most significantly, nowhere does exh. P5 state from where exh. P12 containing the drugs was found. Equally important is the need to realise that exh. P5 does not state from whom exh. P12 was recovered. Even more, PW1 firmly refuted any suggestion that exh. P12 could very well have been in the possession of Kwong Peng Seng. On this issue, PW1 in cross-examination said as follows:

> Q: Oleh kerana selain daripada Low Ah Leck ada juga nama Kwong Peng Seng, boleh jadi dadah milik Kwong Peng Seng? Boleh jadi?
>
> A: Saya tidak setuju.

[29] But that is not all. The learned Judicial Commissioner has also given her most anxious consideration on exh. P5. In the words of the learned Judicial Commissioner:

> Kegagalan SP1 mencatatkan di ruangan catatan di mana bagaimana barang kes dijumpai juga tidak menjejaskan kes pendakwaan. Terdapat keterangan secara terus daripada dua orang saksi pendakwaan iaitu SP1 dan SP4 yang mengesahkan di mana dan bagaimana barang kes ditemui dan tiada alasan bagi saya mempertikaikan kredibiliti mereka.

[30] The passage above makes it patently clear that nothing more may fairly be expected of the learned Judicial Commissioner on this issue. In my judgment, she directed herself correctly upon this aspect of law. Indeed, this direction is along the approach indicated in the case of *Wan Mazuki bin Wan Abdullah v. PP* (Rayuan Jenayah No. 05-56-2008 [7]), which was referred to by

A the learned Deputy Public Prosecutor in her written submission. In that case, the appellant was convicted of the offence of trafficking in 3224.47 grams of cannabis. He appealed to the Federal Court against his conviction. In dismissing the appeal, Richard Malanjum, CJ (Sabah and Sarawak) said this at para. 28
B of the judgment:

> Learned counsel also submitted that before coming to his findings the learned trial Judge failed to consider adequately the contents of the Opening statement of the learned Deputy Public Prosecutor. He further complained that the Search list adduced did
C not state where the drug was found.

[31] Further down at para. 32, His Lordship made an important observation on this point by saying:

> D As for the Search list we are of the view that the omission is minor and one which could be and was in fact clarified in Court by the relevant witnesses called. There is no reason why the omission should be considered fatal as to render the evidence of the relevant witnesses otiose.

E **[32]** In the present case, in re-examination (pp. 68-69 of the appeal record) PW1 has explained and clarified in court as to why he did not state in P5 where exh. P12 was found. This explanation must only be determined by the learned Judicial Commissioner as a trier of fact. Since this issue involved the
F credibility of PW1, the learned Judicial Commissioner was as a matter of fact a better person either to accept or reject his explanation. She accepted PW1's explanation. Having regard to all the surrounding and prevailing circumstances of the case, she was justified in so doing.

G **[33]** The upshot of all this is that the issue regarding exh. P5 is incapable of raising a reasonable doubt on the prosecution's case.

[34] For the reasons that I have stated, I do not see any merit in this appeal. The evidence presented by the prosecution against
H the appellant was compelling. Having carefully scrutinised all the evidence contained in the appeal record and carefully read the judgment of the learned Judicial Commissioner, I am wholly satisfied that the conviction of the appellant is safe. The appeal is therefore dismissed. The conviction and the death sentence made
I by the learned Judicial Commissioner are accordingly affirmed.